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No. 92-1301

In The

Supreme Court of the United States

October Term, 1992

JULIAN R. YOUMANS,

Petitioner,

v.

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Did the Fourth Circuit violate the *Erie* Doctrine by substituting Massachusetts law for the laws of South Carolina, after having determined that South Carolina laws govern the duties of the parties, when ample South Carolina precedent was cited and when the Fourth Circuit failed to apply South Carolina state law resulting in the Fourth Circuit's reversing a $1.6 million jury verdict for the Petitioner?

II. Did the Fourth Circuit exceed its appellate authority and proper role by re-weighing the evidence and impermissibly substitution its findings of fact for the fully supported factual determinations of the jury?

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SUMMARY OF REPLY

Respondent asserts that the Panel opinion was correctly decided under applicable South Carolina precedent, yet fails to cite even one South Carolina case supporting, adopting, citing or even referencing the Massachusetts case which the Fourth Circuit followed and applied to reach its decision and thus deny Youmans of his right to a jury before his peers.

The Panel ignored South Carolina precedent establishing that Prudential owed Youmans duties under the circumstances of this case. The Fourth Circuit applied

Massachusetts precedent decided by the Supreme Judicial Court of Massachusetts which in subsequent years followed and adopted the reasoning in *Citizens and Southern National Bank of SC v. Smith,* 277 S.C. 162, 284 S.E.2d 770 (1981), holding that a later modification of the mortgage by a senior mortgagee shall not prejudice the rights or impair the security of a junior mortgagee without the latter's consent. *Shane v. Winterhill Federal Savings & Loan Assoc.,* 397 Mass. 479, 492 N.E.2d 92 (1986). (Citing with approval *Citizens and Southern v. Smith, supra.*)

Moreover, the Respondent attempts to ignore the critical errors of fact made by the Panel by inviting this Court to also improperly re-weigh the evidence.

REASONS FOR REPLY

A. Respondent's Misstatements of Facts and Law.

1. Respondent alleges that ¶ 30 gave Prudential the right to alter the mortgage obligation pursuant to ¶ 30 of Prudential's mortgage (Res.Brf., pp. 2-3, 17 & 26). To the contrary, Youmans was not and is not bound by ¶ 30 of Prudential's mortgage, as Youmans never signed the first mortgage. Additionally, ¶ 30 does not apply to Youmans' mortgages as by its terms ¶ 30 provides:

> Any agreement hereafter made by Mortgagor and Mortgagee pursuant to this mortgage shall be superior to the rights of the holder of any *intervening* lien or encumbrance. (Prudential's First Mortgage, ¶ 30, emphasis added.)

Therefore, because Youmans' mortgages were contemporaneously placed upon the Property and are not subsequent intervening mortgages, ¶ 30 by its very terms does not give Prudential the right to materially modify the loan to which Youmans has subordinated, without Youmans' knowledge and consent to that modification,

because the modification materially affected Youmans' rights as prohibited by South Carolina law.

2. Respondent claims that any duties owed Youmans were waived by him in the second and third mortgages (Res.Brf., p.21). Conversely, Youmans' mortgages never waived the right to notice or consent, and in fact, require notification of any defaults not cured within any applicable grace period. Additionally, these mortgages do not waive any existing fiduciary or other relationships between Youmans and Prudential.

3. Respondent asserts that District Court Judge Norton received this case shortly before the jury selection began in January 1991 (Res.Brf., p.4, Ftnt.1). To the contrary, Judge Norton was assigned this case and heard the summary judgment motions in September 1990 and tried the case from February 25 to March 8, 1991. In fact, Judge Norton, was the only judge involved in this case to have practiced in South Carolina.

4. Respondent asserts that Youmans' rights embodied in the Commitment Letter did not appear in any of the final closing documents (App.Brf., p.18). Yet, the executed Commitment Letter was produced at closing as an exhibit to the Purchase Agreement as required by ¶ 6(a). Furthermore, Purchase Agreement *exhibits were intended to be and were made part of the closing documents* as noted by ¶ 8(b)(iii) of the Purchase Agreement (See Resp. Brf. p. 9).

5. Respondent claims that Youmans argues that his ¶ 9(e) rights were never required to be in any of the "Closing Documents" (Res.Brf., p.18). This mischaracterizes Youmans' argument. Youmans said that the ¶ 9(e) rights were not required to be in Prudential's first *mortgage* (Pet.Brf., p.5, Ftnt.1) (emphasis added).

6. Respondent asserts that Prudential did not declare a default until June 1987 (Res.Brf., p. 13). This is flatly contradicted by Prudential's own accounts representative who testified to a default which was declared

and existing on the Prudential accounting records as of October 1985 (App. pp. 71-73).

7. Respondent asserts Youmans' use of *West v. American T & T Co.*, 311 U.S. 223 (1940) was inaccurate and misleading (Res.Brf., p. 19). Clearly, *West* was cited for the proposition that the Fourth Circuit is bound by the decisions of the Supreme Court of South Carolina in this diversity action, and because there is persuasive evidence that the Supreme Court of South Carolina has a conflict with and would refuse to follow the Fourth Circuit's decision, this Court has cause to review the decision of the Panel.

B. Negligence

1. Respondent asserts that the Fourth Circuit did not follow or apply Massachusetts law (Resp. Brf., p. 21). This argument fails due to the Fourth Circuit's failure to apply, cite or distinguish any and all of the South Carolina law presented to the court, and moreover, the citation, application, and rendered decision in conformity with the cited Massachusetts law is certainly "following" and "applying" Massachusetts law over the controlling South Carolina precedent (App. 16).

Additionally, contrary to the Fourth Circuit's proclamation that this Massachusetts case stands for the "universal rule," this Massachusetts case has never been adopted or cited by any South Carolina court. Moreover, in *Guleserian*, the first mortgagee sought the approval of the second mortgagee to modify the terms of the first mortgage *prior* to any defaults on the first mortgage. When the second mortgagee refused to consent, a declaratory judgment action was brought whereby the Massachusetts court found the proposed modification was allowable since there had been no default on the first mortgage pursuant to the terms of the existing mortgage.

The Massachusetts court reasoned that the future postponement of payments meant that the subsequent failure to pay those payments should not constitute a default. This is strikingly different from the Prudential action, since no modification was agreed to by Prudential and the Purchaser until *after* the Purchaser had defaulted on six (6) months of regular payments, and these defaults were so noted in Prudential's records (Pet.Brf., pp. 7-10). More importantly, Youmans was never advised of the defaults or any subsequent alteration of the first mortgage obligation until almost two years later.[1]

Finally, the same court that decided *Guleserian*, later adopted and cited *Citizens & Southern* in *Shane v. Winterhill Federal Savings & Loan Assoc.*, 397 Mass. 479, 492 N.E.2d 92 (1986). In *Shane*, the court held that "a later modification of the mortgage by a senior mortgagee may not prejudice the rights or impair the security of a junior mortgagee without the latter's consent." *Id.* Citing with approval South Carolina's holding in *Citizens & Southern, supra*, among other cases.

Under these additional circumstances, the Panel's use of Massachusetts law over applicable South Carolina authority warrants grant of the Writ.

2. Respondent inconsistently claims that no South Carolina authority was provided to the Fourth Circuit identifying a duty owed by Respondent to Youmans, then claims that Youmans takes a "shotgun" approach in identifying the duties owed to Youmans by Respondent (Res.Brf., p. 23).[2]

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[1] It should also be noted that the Purchaser defaulted on the "workout" agreement in 1987 as well by failing to make the January, February, March, April, June, July, August, and September payments, and these defaults were also withheld from Youmans.

[2] Youmans did not take a shotgun approach. The jury was charged with these four duties and returned a general verdict in

Respondent's argument that Youmans did not provide the Fourth Circuit with any South Carolina law supporting a common law duty is an attempt to camouflage the Fourth Circuit's error in application of Massachusetts law. This argument fails because Youmans provided the trial court as well as the Fourth Circuit with four common law duties, in addition to the contract, any of which the jury could have rested its verdict (and did).

a. The *Citizens & Southern* Duty.

While the Respondent attempts to distinguish this South Carolina holding, nowhere did the Panel do so. In *Citizens & Southern*, the owner of the property agreed to subordinate his purchase money mortgages to a bank mortgage made to the purchasers. The purchase money mortgage would be satisfied, new mortgages were to be exchanged, and the seller would, in writing, subordinate these new mortgages to any other mortgages provided the developers would satisfy the outstanding mortgages (to the bank and another individual) within three months and to pay seller $4,000.00. *Id.* 284 S.E.2d at 771. Instead of satisfying the existing loans, the purchaser and the bank extended these loans. This, the court held, prejudiced the seller's subordinated mortgage interests and held that the mortgage was placed behind the seller's mortgage in priority. *Id.*, 284 S.E.2d at 772-773. In substance, this is exactly what happened in Youmans' case.

Youmans' favor, as opposed to a specific verdict. As such, Youmans' verdict is predicated on any one, if not all of these duties (App. 80-82). As such, it is necessary for Youmans to provide these same four duties to the Court's attention not only to demonstrate that the Fourth Circuit failed to apply South Carolina law, but also to demonstrate that the jury was properly charged with such law.

Respondent claims its mortgage provision paragraph 30 allowed it to extend time or otherwise alter the terms of payment or all or any part of the indebtedness without affecting the liability of the purchaser. Respondent claims that this action can be taken even if it prejudices Youmans as the seller and co-lender who subordinated his interests to the lender, Prudential, as part of the sale transaction. This argument was rejected in *Remodeling & Construction Corp. v. Melker,* 65 N.Y.S.2d 738 (1946) which was cited and adopted by the South Carolina court in *Citizens & Southern, supra,* 284 S.E.2d at 772.

In *Remodeling, supra,* the second mortgagee was specifically made subordinate "to the lien of the present first mortgage and any extensions or renewals thereof, or any new first mortgage not exceeding the [principle] sum [of the first mortgage . . .] . . . that may be placed thereon in lieu of the present first mortgage." *Id.* 65 N.Y.S.2d at 739. In spite of this agreement, the court ruled that the senior lienor may not prejudice the rights or impair the security of the junior lienor.*Id.* 65 N.Y.S.2d at 739-741. Similarly, in *Citizens & Southern,* the seller had agreed to subordinate his mortgage to any other mortgages once the developers satisfied the outstanding mortgages to Citizens & Southern and one other individual within three months. The court found that Citizens & Southern's extension of the existing mortgage prejudiced the seller's interests, even though the seller had agreed to subordinate his mortgages to any other mortgages with no stated limitation of terms as to amount or interest rate so long as the existing mortgages had been satisfied within three months and he was to be paid a flat sum of $4,000.00. *Id.* 284 S.E.2d at 771. There, the court determined that the extension without the seller's consent was a material modification of the loan that affected the seller's rights. *Id.* 284 S.E.2d at 772-773.

Because Youmans agreed to subordinate based upon the terms of the existing Prudential loan between Prudential and Purchaser secured by the first mortgage and not the new loan terms, and because in *Bulldog Properties v. Firestart*, 301 S.C. 336, 391 S.E.2d 871, 872 (Ct.App. 1990) the subordinated mortgagee agreed to the change in the subordination agreement, *Bulldog* is not controlling.

b. Potential Sources of Duties Under South Carolina Law

As to the remaining sources of duties recognized by South Carolina law and properly presented to the jury and Fourth Circuit of which the Fourth Circuit failed to apply, the issue is whether or not the Fourth Circuit erred in applying Massachusetts law and failing to observe existing South Carolina precedent which establishes a duty on behalf of Respondent. Whether or not such duty existed from the relationship between Youmans and Respondent or whether such duty was otherwise assumed is a jury question and not before this Court. The same is true for the duty arising out of the relationship as co-lenders.[3]

C. The Contract.

Respondent alleges that this is not an appropriate subject for appellate review. This argument fails because

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[3] The Respondent erred in claiming that Petitioner is relying on a Virginia case for an *Erie* violation since *American Realty Trust v. Chase Manhattan Bank, N.A.*, 222 Va. 392, 281 S.E.2d 825 (Va. 1981) has been adopted and followed in South Carolina in *Hope Petty Motors of Columbia, Inc. v. Hyatt*, ___ S.C. ___, 425 S.E.2d 786 (Ct.App. 1992) (Res.Brf., p.25, Ftnt. #4). Conversely, the Massachusetts precedent relied on by the Fourth Circuit Panel has not been similarly adopted or cited by any South Carolina court.

the Fourth Circuit is bound by the decisions of the Supreme Court of South Carolina in diversity actions, and because there is persuasive evidence that the Supreme Court of South Carolina has a conflict with and would refuse to follow the Panel's decision. *See Six Company v. Highway Dist.*, 311 U.S. 180 (1940); *West, supra.*

Respondent contends that merger law is applicable. The Doctrine of Merger, however, is inapplicable to a consistent agreement that was *not intended* to be merged into another written agreement (*see* Res. Brf. pp. 22-27). Contrary to Respondent's claim that Youmans failed to identify any disputed facts that should have ever been submitted to the jury (Res. Brf. p. 28), Petitioner identified this key issue of *intent* which was properly submitted to the jury (App., pp. 75-78) and subsequently decided in Youmans' favor (App., pp. 20-21).

Additionally, Respondent contends that on nothing more than four alleged "undisputed facts" it was entitled to judgment (Resp. Brf. pp. 28-29). This is wrong. First, statements 2, 3, and 4 are incorrect and certainly disputed by Petitioner. Second, these statements, in and of themselves, do not meet the standard for granting judgment notwithstanding the verdict since the evidence must be weighed in the light most favorable to the Petitioner as the non-moving party. At no time did the Fourth Circuit find that the evidence pointed so strongly in favor of Respondent that reasonable minds could not find for the Petitioner. Especially, when the only documents signed at closing by all three parties to the transaction attest to the continued vitality of Commitment Letter embodying Youmans' rights. Nevertheless, correcting the Fourth Circuit's plain factual errors would provide a sufficient basis for upholding the jury verdict.

Although Respondent does not defend the Panel's critical factual errors by disputing the facts, Respondent

raises the issue by attempting to have this Court also reweigh the evidence.

CONCLUSION

Youmans reiterates certiorari should be granted based upon the legal and factual errors made by the Fourth Circuit Panel. Alternatively, the Court could reverse and remand the case to the Panel to correct the clear legal and factual errors, and further, direct that the legal issues be certified to the South Carolina Supreme Court.

Respectfully submitted,

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